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87-2051

No. _____

In The

Supreme Court of the United States

October Term, 1987

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD L. WILSON
902 Lee Road, Suite 30-450
Orlando, Florida 32810-5585
(407) 648-9129

Attorney for Petitioners

G. RANDALL GARROU
433 N. Camden Drive, Suite 900
Beverly Hills, California 90210

Of Counsel

116 pp

CONTENTS

Appendix A .....Opinion of the United States Court of Appeals for the Fifth Circuit

Appendix B .....Judgment and Opinion of the United States District Court for the Northern District of Texas

Appendix C .....Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing and Rehearing *En Banc*

Appendix D .....Order of the Supreme Court of the United States Granting Stay of Judgment of Court of Appeals

APPENDIX A

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

THE CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

O

JOHN RANDALL DUMAS d/b/a GENO'S,

Plaintiff,

TEMPO TAMERS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC.,

Defendant-Appellee.

O

CALVIN BERRY, III, et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

(February 12, 1988)

Before THORNBERRY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

In the early summer of 1986, the City of Dallas, Texas began to consider the regulation of the effects of sexually oriented businesses upon the community. After study of similar efforts by other metropolitan cities, the City Council passed a detailed ordinance that imposed licensing and zoning restrictions upon sexually oriented businesses. A variety of businesses that would be subject to its regulations attacked the Ordinance in three separate federal suits. Each of the three suits asked the district court to enjoin enforcement of the Ordinance and declare it unconstitutional. The suits were consolidated and the case was submitted for decision on motions for summary judgment filed by all parties. The district court, with exceptions not complained of here, upheld the Ordinance in a detailed written opinion. [1]

These plaintiffs appeal urging that the district court erred in two main regards. First, plaintiffs allege that the licensing provisions are content-based regulations, a prior restraint upon activity protected by the first amendment, and invalid because they lack the required procedural protections for such regulation. Second, plaintiffs complain that the court was wrong to conclude that reasonable alternative locations are available for existing businesses forced to move by the Ordinance, an inadequacy that denied their rights under the first and fourteenth amendments. Plaintiffs also make more specific attacks to the Ordinance. They urge that the licensing scheme is

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1 *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986).

unconstitutional because it fails to limit the discretion of the Chief of Police, the licensing official, and because it disqualifies persons based on their criminal record.

We are not persuaded that the district court erred in its rejection of the constitutional attack and affirm. Other and more narrow attacks upon specific provisions of this ordinance were also made. We will explain these contentions and our reasons for affirming their rejection in due course.

I

The Ordinance subjects sexually oriented businesses to zoning and licensing requirements. A business must be at least 1000 feet from another sexually oriented business or a church, school, residential area, or park. Such businesses must also obtain a license issued by the Chief of Police and permit inspection of their premises when open or occupied. A license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution. The ordinance also requires that viewing rooms in adult theatres be configured to allow visual surveillance by management.

The ordinance recites that its purpose is to promote health, safety and morals, and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment."

The city attorney first presented the Ordinance to the Dallas City Plan Commission. The Plan Commission heard testimony from supporters as well as opponents of the Ordinance. The Commission considered studies of other cities regarding the relationship among concentrations of sexually oriented business, crime and property values, but did not conduct studies of Dallas itself. The Plan Commission did, however, consider a study of alternative locations within Dallas for the affected businesses. On the basis of its findings, the Plan Commission unanimously recommended that the City Council adopt the Ordinance.

The Council unanimously adopted the Ordinance after making a number of findings. It considered the same studies as well as a study conducted by the Dallas Police Department that concluded that crime rates are 90% higher in adult districts. The Council concluded that public health and safety required regulation of these businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature"; that there have been a susbstantial number of arrests for sex-related crimes near these businesses; and that the evidence that these businesses are associated with "urban blight" and declining property values is well documented.

II

We first examine the district court's exercise of jurisdiction and the standing of the plaintiffs. Seven of the nine types of sexually oriented businesses regulated by the Ordinance are represented by at least one plaintiff. These plaintiffs include adult arcades, adult bookstores, adult video stores, adult cabarets, adult motels, adult motion picture theaters, and nude model studios. Only escort agencies and sexual encounter centers are not before the court and we do not decide the constitutionality of the Ordinance as it applies to them. Nor do we decide whether the Ordinance may constitutionally reach businesses that sell sexually-oriented reading materials or videos solely for use off the business' premises. Each of the book and video stores before us also offered on-premises consumption of sexually oriented materials.

There is no question but that this is a genuine and not a hypothetical controversy. The plaintiffs are subject to the terms of the Ordinance and obedience to its terms will limit business in ways that will result in economic loss as well as a loss of freedom to engage in acts that enjoy some measure of protection under the first amendment.

We also are not persuaded that there is a basis for abstention. There were no pending state proceedings, none have been instituted, and we are not pointed to any possible

construction of the Ordinance by state courts that might make imprudent our exercise of jurisdiction.

III

Plaintiffs contend that the licensing scheme must fail for several related reasons. First, they argue that insisting on a license for sexually oriented businesses regulates the content of expression protected by the first amendment without the procedural protections of *Freedman v. Maryland*,[2] and *Fernandes v. Limmer*.[3] The ordinance is said to suffer three procedural deficiencies: it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

We are not persuaded that this ordinance requires such procedural safeguards for its validity. The argument assumes that the Ordinance licensing scheme regulates protected activity in a way that triggers the procedural requirement of *Freedman*. The ultimate issue in *Freedman* was the constitutionality of Maryland's motion picture statute. Maryland made it unlawful to distribute or exhibit films unapproved by a Board of Censors. Maryland did not provide for judicial participation or

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2 380 U.S. 51 (1965).

3 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

otherwise assure prompt review in its procedure although its board could bar the showing of a film. The court held that this prior restraint can avoid constitutional infirmity only if hedged by procedural safeguards designed to obviate the dangers of a censorship system. The court concluded that these safeguards include the state's shouldering of the burden of persuasion, a "procedure requiring a judicial determination . . . ," and restriction of prior restraint to the shortest fixed period compatible with sound judicial resolution.[4]

We applied *Freedman* in *Fernandes* to strike down a regulation of the Dallas-Fort Worth Airport Authority denying followers of the Krishna religion a license to solicit at the airport. We rejected the suggestion that the regulation was sufficiently content-neutral to escape the procedural requirements of *Freedman*: "Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*: to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights."[5]

A license from the airport authority was necessary in order to solicit for religious purposes in a public forum. There was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward

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4 *Id.* at 58-59.

5 663 F.2d at 628.

consequences and no findings that the protected conduct had consequences regulable by the state under its police power. Stated more directly, the airport authority was seen as controlling a religious group's access to a public forum without justification. We concluded that *Freedman's* protections were required but absent.

In *Fernandes* we did not apply the time, place and manner analysis of *Young v. American Mini Theatres, Inc.*[6] There the Supreme Court faced a zoning scheme similar to the Dallas Ordinance. It prohibited locating an adult theatre within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone. Although a majority of the Justices voted to uphold the regulation, five could not agree on a single rationale.

Four years after our decision in *Fernandes*, however, a majority of the Supreme Court settled on a time, place and manner rationale for zoning an activity that is sexually oriented but not obscene. In *City of Renton v. Playtime Theatres, Inc.*[7] the Court reviewed a zoning ordinance enacted by Renton, Washington that prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school.[8] Characterizing the *City of Renton* ordinance as a time, place or

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6 427 U.S. 50 (1976).

7 106 S.Ct. 925.

8 *Id.* at 925-27.

manner restriction, the Court found the first amendment satisfied because the city had a substantial interest in regulating sexually oriented businesses and did so without restricting alternative avenues of communication.[9]

We applied *City of Renton* to a licensing scheme substantially similar to the Dallas Ordinance in *SDJ, Inc. v. City of Houston.*[10] On the basis of *City of Renton*, we upheld the Houston ordinance against a facial first amendment challenge. The opponents of the Ordinance, however, made no attack to the procedural protections in the Ordinance. Nevertheless, the *City of Renton* and *City of Houston* decisions guide our analysis of the procedural protections the City of Dallas must provide here.

Most important, these decisions recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. The *City of Renton* Court found no reason to apply rigorous content-based analysis where a city's "predominant concern" is to control the negative effects of a certain kind of business rather than to suppress a certain type of speech.[11] In addition, the court held that sexua'ly explicit materials deserve less first amendment protection than other kinds of speech.[12] In short, to the extent

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9 *Id.* at 930-32

10 Slip op. No. 86-2735 (5th Cir. Feb. 10, 1988).

11 *City of Renton*, 106 S.Ct. at 930.

12 *Id.* at 929-30 n.2.

that *Fenandes* reaches Dallas' present zoning regulation, it is limited by the *City of Renton* decision; the first amendment protection required for religious activity, including proselytizing and solicitation of money, is of a different order than the protection due sexually oriented businesses.

We find that the Dallas Ordinance, like the Ordinance before the Court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content.

This is not to say that the lower level of protection provided in *City of Renton* inevitably excludes the procedures required by *Fernandes* In this case, however, those procedures were not necessary insofar as the Dallas Ordinance regulates a *business* engaged in an activity subject only to the lesser protection. *Fernandes* procedures are less important then a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a particular movie–as in *Freedman*–nor episodic solicitation efforts–as in *Fernandes*–but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that

review is not given immediately.[13] We do not decide today whether *Fernandes* procedures apply to lesser-protected activities conducted outside the realm of an ongoing commercial enterprise.

We are also satisfied that the Ordinance is valid on its face. Because the Ordinance in City of Renton was a content-neutral time, place or manner restriction, the Supreme Court required only that it be "designed to serve a substantial government interest" and allow for "reasonable alternative avenues of communication."[14] The Dallas Ordinance meets both those requirements. Like the *City of Renton* ordinance, the Dallas law was designed to serve the City's interest in maintaining "the quality of urban life."[15] The City Council's consideration of the criminal effects of concentrated sexually-oriented businesses was thorough, as was its review of the effects such concentrations have on property values. In short, Dallas has demonstrated that the Ordinance furthers a substantial government interest.

The Ordinance also allows reasonable alternative avenues of communication. In *Basiardanes v. City of Galveston*,[16] we held that an ordinance restricting adult theatres to locations that

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13 *Cf. Freedman* 380 U.S. at 59 (noting that "[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation").

14 *City of Renton*, 106 S.Ct. at 930.

15 *Id.* at 930.

16 682 F.2d 1203, 1214 (5th Cir. 1982).

were "poorly lit, barren of structures suitable for showing films, and perhaps unsafe," did not provide adequate alternative locations. Here, however, the City offered evidence that convinced the district court that the alternative sites are feasible locations and not just open areas on a city map. Putting aside the question of the deference the district court owed the findings of the city council regarding alternative locations, it had evidence before it sufficient to sustain its findings. Plaintiffs suggest that such findings are inappropriate for deciding a motion for summary judgment. Perhaps that is so, and we express no opinion in this regard. However, the parties submitted the case for decision on the record and the record supports the district court's findings regarding the number of alternative locations.

IV

We also are not convinced by the other constitutional attacks against the Ordinance's licensing provisions. Appellants rely on several different constitutional provisions in their challenge: they attack three specific license requirements as prior restraints under the first amendment, they contend that the Ordinance's grant of discretion to the police chief violated the first amendment's prohibition on vagueness, and they argue that the Ordinance's inspection-consent provision violates the

fourth amendment's limitations on searches as well as the first amendment. We deal with these attacks in turn.

A

As a threshold matter, we note that the *City of Renton* standard of review applies to the details of the licensing scheme–as opposed to the zoning rules–even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the license requirements and the city's justification for enforcing them are the same for both kinds of restrictions. Whether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same–the operator must refrain from the activity and his only altenative is to comply with the Ordinance and obtain a license.[17] Indeed, as the very title of the doctrine

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17 Contrary to Judge Thornberry's dissent, *see post* at 9, *Fernandes* did not hold that a licensing scheme may never be used to implement a valid time, place or manner restriction on speech activity. Rather, *Fernandes* held that the delay in judicial review of a license denial itself impermissibly infringed on the applicant's right to speak for the duration of that delay. 663 F.2d at 628. The fact that this delay occurred in the context of licensing was not important to the court's decision. More on point is the pre-*Renton* decision, *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). There the court upheld a zoning provision scattering adult businesses pursuant to a finding by the City of Peoria that concentrations of such businesses eroded neighborhoods. Notably, *Genusa* accepted the proposition that licensing requirements be treated under the same analysis as zoning. *See id.* at 1212.

suggests, "time, place or manner" analysis cannot be limited solely to regulation of "place."

On this basis we hold, in accordance with the prevailing view, that the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open.[18] Although this requirement is based on slightly different considerations than those that support the zoning requirements, the public purpose involved is no less substantial. The City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres. The substantial government interest in curbing such effects supports the open booth requirement as a valid restriction under *City of Renton* standards.

The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

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18 *See Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982).

Appellants also attack the Ordinance provision that denies licenses to persons convicted of certain crimes.[19] Arguably, it is awkward to analyze this occupational disability as a time, place or manner restriction within the City of Renton framework. This part of the Ordinance does not simply regulate the manner of protected activity, it denies the right of persons convicted of certain crimes to engage in the regulated businesses.

Proceeding in categorical terms sheds little light on the standard of review we should apply, although we can imagine three possibilities. First, we might subject the provision to the strict level of review reserved for content-based regulation, and require the city to show that the provision is precisely drawn to serve a compelling interest.[20] Second, we might apply *City of Renton's* approach and require that the provision serve a substantial government interest while leaving open alternative avenues of communication. Finally, although the provision might not be considered content neutral, the fact that it impinges on a lesser-protected category of speech might justify the application of some intermediate standard of review, particularly when the regulation is a form of disability commonly attending convictions.

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19 These included a variety of prostitution offenses; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; runaway child.

20 *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541 (1980).

A strong argument can be made that we need not determine which standard of review is most appropriate because the provision can in any event withstand strict scrutiny; that the city's findings demonstate a compelling interest in limiting the involvement of convicted persons in the operation of sexually oriented businesses; that by documenting the strong relationship between sexually-oriented businesses and sexually related crimes, the city established a compelling justification for barring those prone to such crimes from the management of these businesses. The argument would continue that the city's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism.[21]

While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and the evil sought to be prevented. The courts have not engaged in such strict scrutiny or otherwise required compelling necessity to justify other occupational bars attending a criminal conviction, including those laced with

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21 *Cf. De Veau v. Braisted*, 363 U.S. 144, 158-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); *106 Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (first amendment permits revocation of theatre license for violation of law against sexually explicit screenings), *cert. denied*, 422 U.S. 1044 (1975).

activity protected by the first amendment such as labor organizing. In short, the City need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance is now sufficiently well tailored to achieve its ends. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.[22]

In addition, the Ordinance permits licensing of former offenders after enough time has passed to indicate they are no longer criminally inclined, and takes into account the seriousness of applicant's offenses.[23] The relationship between the offense and the evil to be regulated is direct and substantial.

This result also is consistent with our decision in *Fernandes*. The ordinance challenged in *Fernandes* denied a permit to anyone convicted of an offense involving moral turpitude. Yet, in *Fernandes* there was no immediate relationship between crimes of moral turpitude and the purpose of the airport's ordinance.[24]

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22 The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses included kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." *Dumas*, 648 F. Supp. at 1074.

23 An individual convicted of a specified misdemeanor becomes eligible for a license two years after the conviction or end of confinement, whichever is later; for felonies or multiple misdemeanors the period is five years.

24 *See* 663 F.2d at 630.

B

We also agree with the district court that the Ordinance does not give impermissibly broad discretion to the Chief of Police in issuing, suspending, and revoking licenses. Among other things, the Ordinance empowers the Chief of Police to require "reasonably necessary" information in a license application, to deny a license for failure to comply with "applicable [health, fire and building] laws and ordinances," and to revoke a license if the licensee gave "false or misleading information" in the application or has "knowingly" permitted illegal conduct on the premises.[25]

As these examples demonstrate, the Ordinance relies on standards that are "susceptible of objective measurement" and thus consistent with the first amendment.[26] The factual basis necessary for each of these determinations is either implicitly obvious, as in what constitutes "false" information or information "reasonably necessary" for an application, or

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25 Although the district court left these provisions standing, the court invalidated two sections of the ordinance as unduly discretionary. One provision denied a license to applicants who have been "unable to operate or manage a sexually oriented business in a peaceful and law-abiding manner." The other permitted issuance of a license to applicants who, although previously convicted of a crime, are "presently fit to operate a sexually oriented business." *See Dumas*, 648 F. Supp. at 1072-73. The district court struck these parts from the ordinance, so they are not before us.

26 *See Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1987); *Kunz v. New York*, 340 U.S. 290 (1951).

ascertainable through reference to other sources of law, as in what constitutes a violation of health laws or knowledge of illegal conduct.[27]

C

Finally, plaintiffs attack the Ordinance provision permitting the inspection of a licensed business whenever the premises are occupied or open for business.[28] We reject the argument that this provision violates the fourth amendment prohibition against unreasonable searches. Under the adminstrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a pervasively regulated business.[29]

Communities have long been concerned about the effects of sexually oriented businesses and have attempted to cope with those effects through regulation. Indeed, in light of this history of regulation we rejected a facial fourth amendment attack to an ordinance permitting warrantless searches of licensed massage

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27 *See SDJ, Inc. v. City of Houston, supra* (upholding similar ordinance provision).

28 Judge Thornberry would invalidate the requirement that licensed businesses comply with the city's health, fire and building codes as a restraint of speech unrelated to the city's stated purposes. We do not reach this issue because the Appellants' only stated attack to the code-compliance requirement was that it vested too much discretion in city officials. We have dealt fully with this argument, but we will not consider others not presented to us.

29 *See United States v. Biswell*, 406 U.S. 311, 316 (1972); *Marshall v. Barlow's, Inc.* 436 U.S. 307, 313 (1978).

parlors.[30] We hold that sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable.

Nor do we find the inspection provisions unduly burdensome under the first amendment. The power of the city to inspect for violations does not enhance the Ordinance's suppressive effect, for the city may revoke a license only for non-compliance with substantive provisions we have determined to be consistent with *City of Renton* standards. Rather, the city has a substantial interest in enforcing the Ordinance and the inspection provision is well tailored to serve that interest.

AFFIRMED.

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30 *See Pollard v. Cockrell*, 578 F.2d 1002, 1014 (5th Cir. 1978).

THORNBERRY, Circuit Judge, concurring in part and dissenting in part:

As stated by the majority, this case concerns the limits on the manner in which the City of Dallas may restrict the speech of its citizens in its continuing fight against crime and urban blight. Dallas has chosen, as a means of achieving these laudable goals, a system of licensing and zoning of sexually oriented businesses. Because the activities of many of these businesses implicate First Amendment concerns, it is the duty of this court to closely examine these laws. Because I believe the majority has not applied standards consistent with prior case law in its examination of the ordinance, I respectfully dissent from part of the majority opinion.

I dissent only with respect to those businesses whose activities directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters. Because no showing has been made that these businesses in any way involve obscenity, they are entitled to First Amendment protection. *See, e.g., Schad v. Borough of Mount Ephraim*, 101 S.Ct. 2176, 2184 n.10 (discussing how *Young v. American Mini Theatres, Inc.*, 96 S.Ct. 2440 (1976) analyzed the impact on the First Amendment of an ordinance zoning adult movie theaters), 101 S.Ct. at 2186 (holding that nonobscene nude dancing is protected by the First Amendment) (1981). I therefore concur with the majority insofar as it

upholds the ordinance as applied to businesses, such as adult motels, whose primary activities are not speech.

I also concur with the majority's result in upholding the zoning provisions of the ordinance. I do wish to clarify that I understand the time, place, and manner doctrine as applying only to restrictions like the zoning provisions of the Dallas ordinance. The time, place, and manner doctrine should not apply to the licensing laws[1] if the denial of a license completely bans the speech of the person denied and does not leave the speaker alternative avenues of communication. *See, e.g., Basiardanes v. Galveston*, 682 F.2d 1203, 1213 (5th Cir. 1982) ("A reasonable time, place, and manner regulation restricts speech but leaves open adequate alternative channels of communication to the speaker.").

I

In *Freedman v. Maryland*, 85 S.Ct. 734 (1965), the Supreme Court required that the state provide certain procedural safeguards before imposing a prior restraint on speech. First, the state must have the burden of instituting judicial proceedings in which it bears the burden of justifying its actions. Second, some system must assure that any interim

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1 The time, place, and manner doctrines generally only apply to regulations of speech in public forums and to zoning regulations. *See generally* 3 R. Rotunda, J. Nowak, & J Young, *Treatise on Constitutional Law: Substance and Procedure* ch. XIII (1986).

restraint imposed pending judicial resolution will be of brief duration. Finally, the state must guarantee swift judicial action. *Id.* at 739. In essence, *Freedman* hold that "no forum except a court can be permitted to impose a valid final restraint on expressional activities. . . . " L. Tribe, *American Constitutional Law* § 12-34 (1978).

The Dallas ordinance does not provide for a court to review license denials in the manner required by *Freedman*.[2] The ordinance places the burden of appealing on the licensee, gives no assurance that the burden placed on one denied a license will be of brief duration, and contains no guarantee of swift judicial action. The denial of a license to engage in speech is, however, the classic prior restraint.[3] Thus, it seems to me, on its face *Freedman* condemns the ordinance.

The majority apparently concludes, however, that *Freedman's* procedural safeguards are not needed because the

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2 Section 41-11 of the ordinance provides for the following procedures if a license is denied, suspended or revoked:
If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action *and the right to appeal. The aggrieved party may appeal* the decision of the chief of police *to a permit and license appeal board* in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision.

3 Indeed, the First Amendment grew out of a struggle in England over a system of licensing the press. *See Near v. Minnesota*, 51 S.Ct. 625, 630 (1930). Although the Dallas ordinance does not apply the content-sensitive methods of the English system, "prior restraint doctrine has been invoked to strike down content-neutral permit systems that regulate protected First Amendment activities." *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. Unit A 1981).

procedural safeguards, in addition to the substantive provisions, is narrowly tailored to any identified state interest.

In discussing the constitutionality of the absence of the *Freedman* safeguards, the majority does make one argument that deserves special attention. According to the majority, the procedural safeguards are less important when a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a partcular movie–as in *Freedman*–nor episodic solicitation efforts–as in *Fernandes*–but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately.

The majority is arguing that the more severe the infringement on a person's First Amendment rights, the less protection that person deserves. A government cannot avoid the constitutional procedures that safeguard an individual's rights merely by smothering the rights to such an extent that the individual is taunted into fighting back. This dangerous reasoning, which can only serve to encourage governments to impose the strongest possible burden on what they deem to be unacceptable speech, contravenes the precepts of the First Amendment.

The majority also attempts to escape *Fernandes* by arguing that the denial of a license to engage in sexually oriented speech need not be narrowly tailored even if the speech is nonobscene

See Fernandes, 663 F.2d at 635. Moreover, *Fernandes* expressly referred to "D/FW's content-neutral permit system." *Id.* at 627. Thus, the majority's conclusion that *Fernandes* did not involve a content-neutral regulation is unwarranted.

The majority also attempts to distinguish *Fernandes* by stating that "[t]here was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward consequences and no findings that the protected conduct had consequences regulable by the state under its police power." But *Fernandes* imposes procedural requirements on even narrowly tailored restraints. The *Fernandes* court found that some of the substantive provisions of the airport ordinance withstood constitutional scrutiny. *Id.* at 629 (denial of permit for false statements in permit application), at 636 (denial of permit for interference with pedestrian traffic). Nevertheless, the court still required that the Airport Board adhere to the procedural safeguards when denying a permit. *Id.* at 628. The majority has not offered any valid justification for the absence of procedural safeguards in the Dallas ordinance. Most of the justifications offered by the majority only relate to the validity of the substantive restrictions the Dallas ordinance places on First Amendment activity. They are irrelevant to the adequacy of the procedural safeguards attending the substantive restrictions–a central concern of *Fernandes*. The majority never argues, and probably cannot argue, that the absence of

930. As Justice Powell elaborated in his concurrence in *Young*, "the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." *Young*, 96 S.Ct. at 2458 n.6.

It is in this context that the Court allowed a distinction between sexually oriented speech and other speech. The Court was discussing only whether a state could choose to single out sexually oriented speech from other types of speech without violating its threshold obligation of content-neutrality. The Court concluded that such regulations are content-neutral. Because of that conclusion, and because the ordinance in *Renton* was a zoning ordinance that allowed alternative avenues of communication, the Court applied the reasonable time, place, and manner review. But nothing in *Renton* supports the majority's severing of the time, place, and manner standard from its proper context, and applying that standard to this licensing ordinance. This licensing has a far more substantial impact on speech than zoning because zoning leaves open alternative avenues of communication. The denial of a license is a complete ban on speech.

I can conceive of a licensing law that would be analyzed as a time, place, and manner restriction. For instance, if a government, to prevent overcrowding, required a person to get a license to use a park at a certain hour of the day, that would be a regulation of the time at which the person may speak. The

person, however, would still be allowed to speak, although perhaps at a different time than he originally anticipated. The Dallas licensing scheme, however, is a regulation of a different magnitude. It completely prevents certain persons from speaking. It thus does not merely regulate the time, place, or manner is which one may speak, but says one may not speak at all.

Naturally, I agree with the majority that the current regulations are content-neutral. The regulations are justified by concerns unrelated to the suppression of speech. I strongly disagree with the majority, however, on the answer to the ultimate question of the constitutionality of the licensing scheme. I would apply a review stricter than mere reasonableness to content-neutral regulations that have the effect of totally banning certain speech. I cannot believe that the Supreme Court intended that all regulations of sexually oriented speech are somehow to be judged as time, place, and manner restrictions requiring only a review as to their reasonableness. Although the Court in *Renton* was willing to allow a reasonable time, place, and manner regulation that singled out sexually oriented speech, it still required alternative areas for that speech. Surely, however, the Court would more closely examine a regulation of this speech that does not leave any avenue of communication for the speaker.

Applying a time, place, and manner analysis to a licensing statute that completely bans certain classes of persons from

speaking is illogical. Although the majority speaks of deference to the district court's finding that the ordinance allows for reasonable alternative locations for speech, that finding can relate only to the zoning regulations; it cannot relate to this licensing regulation. A person who is completely banned from speech because, for example, he has in the past been convicted of some crime has no other avenue of communication. *Cf. Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3177 n.2 (1986) (distinguishing an order closing an adult book store from an "unconstitutional prior restraint" partly because the party could carry on his bookselling business in other locations). The time at which he may speak, the place where he may speak, and the manner in which he may speak are not merely being regulated; his entire speech is being extinguished. Therefore, when examining the constitutionality of those parts of the Dallas licensing scheme, which, unlike zoning regulations, completely ban a person from speaking, I strongly believe that the First Amendment requires a standard of review more strict than that contained in the time, place, and manner doctrine

In *Fernandes*, this court advanced persuasive reasons for concluding that *Freedman's* procedural safeguards should apply to even content-neutral regulation of speech.

Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*:

to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights. Therefore, "[t]he *Freedman* principle is applicable here."

The lack of these procedural protections in this licensing system means that the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review. *Fernandes*, 663 F.2d at 628 (citations omitted). This reasoning also applies in the current case. When Dallas denies a license to an adult bookstore or movie theater, it impairs the ability to speak. Likewise, a delay in a judicial determination of the propriety of the denial continues that impairment. Under the ordinance, "the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review." Thus, *Fernandes* and *Freedman* require the procedural safeguards.

II

I must also dissent from the majority's holdings regarding some of the substantive licensing provisions. Before a license may issue, Section 41-5 (a) (6) of the ordinance requires that the premises of a sexually oriented business first be "approved by the health department, fire department, and the building

official as being in compliance with applicable laws and ordinances." The Seventh Circuit, however, struck down a similar ordinance in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

The ordinance in *Genusa*, like the Dallas ordinance, was partially motivated by a desire to retard urban blight. *Id.* at 1214. The *Genusa* court found, however, that this interest could not justify special safety inspections, stating "there is nothing in the record to indicate that adult bookstores, as a class, contain more faulty light switches or other violations than regular bookstores, as a class." *Id.* Thus, the court concluded that the ordinance was not shown to further any legitimate interest unrelated to the suppression of free expression. For this reason, the court invalidated the inspection provision. *Id.* at 1215.

Likewise, the City of Dallas has produced no legitimate justification for its prelicensing health, fire, and builkding code approval requirement.[4] Adult bookstores are, of course, subject to the same health and safety laws as any other

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4 In footnote 28 the majority suggests that the Appellants have not raised this issue. The majority says that the Appellants' only attack on Section 41-5(a) (6) is that the section vests too much discretion in city officials. However, the Appellants' arguments about discretion are clearly a First Amendment challenge to Section 41-5(a) (6). Thus, the Appellants have raised the issue of the section's constitutionality. Additionally, in attacking Section 41-7, the post-licensing inspection provision, the Appellants quote *Genusa* in raising the issue of the city's justifications for imposing additional health, safety, and building code requirements. Thus, I would think that this court may now address whether Section 41-5(a) (6) is legitimately justified.

business. They may not, however, "be singled out for special regulation unless the city can demonstrate that such action is narrowly devised to further a substantial and legitimate state interest unrelated to censorship or the suppression of protected expression." *Id.* at 1214. Section 41-4 (a)(6) is, therefore, not constitutionally justified. Moreover, following this same reasoning, Section 41-7, which the majority characterizes as "a provision permitting warrantless inspection," should be invalid. *See Id.* at 1221 (striking down provision that required biannual warrantless inspections).[5] That section also relates to burdensome health and safety inspections.

I am also troubled by the majority's analysis upholding the provision allowing the denial of a license to persons convicted of certain crimes. Courts have frequently condemned the denial of a license to engage in speech related activities because of a person's criminal history. As this court has stated, "[p]ersons with prior criminal records are not First Amendment outcasts." *Fernandes*, 663 F.2d at 630; *see also Genusa*, 619 F.2d at 1219 n.40 ("We know of no doctrine that permits the state to deny a person First Amendment liberties other than the right to vote solely because that person was once convicted of a crime or other offense."). The majority cites *DeVeau v. Braisted*, 80 S.Ct. 1154 (1960) to argue that barring persons with criminal records from certain employment is a common legislative

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5 I stress that I would invalidate this provision on First Amendment grounds, and I thus give no opinion regarding the Fourth Amendment challenge.

device that needs to pass only minimal scrutiny. However, *DeVeau* by its own terms applies only to "certain employments closely touching the public interest." *Id.* at 1154 (discussing sitting on a jury, entering the Army, or holding an office of trust under the United States). Clearly, the government's interest in employment in sexually oriented businesses is not as great as its interest in such vital areas.

A recent Supreme Court opinion, *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172 (1986), illustrates that statutes that have more than an incidental impact on speech must be strictly scrutinized–even if the statute is an attempt to fight crime. The Court in *Arcara* upheld a statute allowing the closure of businesses used for prostitution, even as applied to an adult bookstore. However, the reasons given by the Court for not applying strict scrutiny in *Arcara* illustrate that such scrutiny should apply in the current case. *Arcara* involved a statute of general application; the statute provided for the closure of *any* building found to be a public health hazard. The Court relied on the fact that the statute did not "inevitably single out bookstores or other engaged in First Amendment protected activities for the imposition of its burden . . . . " *Id.* at 3177.[6] The Court held that the First Amendment was not implicated by the statute, *id.* at 3178, because it imposed only an incidental burden of the exercise of free speech. *Id.* at 3177 (stating that the severity of

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6 Moreover, the Court distinguished *Arcara* from cases involving prior restraints because the respondent could simply move to another location to continue his bookselling. 106 S.Ct. at 3177 n.2.

the burden was "dubious at best" and was mitigated by the fact that respondents could sell their material at another location). For that reason the Court declined to apply the strictest scrutiny. *Id.*

The Dallas ordinance does single out those engaged in First Amendment activity and must use the least restrictive means to accomplish its legitimate purposes. The burden imposed on one denied a license is extremely heavy–for a period of years, that person is denied the ability to engage in certain speech. Before the court is willing to accept such a heavy burden as the least restrictive means, it should require that the City produce "impressive" evidence that allowing convicted felons to speak "will 'surely result in direct, immediate, and irreparable damage.'" *Fernandes*, 663 F.2d at 629-630 (quoting *New York Times Co. v. United States*, 91 S.Ct. 2140, 2149 (1971) (Stewart, J., concurring).

The majority would not place a heavier burden on the government to support the substantive licensing provisions than the zoning provisions. According to the majority, "[w]hether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same–the operator must refrain from the activity and his only alternative is to comply with the Ordinance and obtain a license." However, a person who is prevented from speaking at one location because of a zoning restriction can move to the alternative location that must exist.

A person barred from speaking because of his criminal history has no such option.

Although I understand the majority's desire to not interfere with a city that is struggling to fight crime and urban blight, I am unwilling to let that desire interfere with this court's duty to strictly analyze the methods chosen by the city when those methods directly implicate the First Amendment. Because I believe the majority has not applied the required strict scrutiny, and because some of the chosen licensing provisions and procedures cannot withstand such scrutiny, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CASE NO. CA3-86-1759-R

FW/PBS, INC., DSB, INC.,	)
CHARLES E. CARLOCK,	)
LONE STAR MULTI THEATRES,	)
BEVERLY K. VAN DUSEN,	)
BILL STATEN, JR.,	)
BI-TI ENTERPRISES, INC.,	)
GATTIE CORPORATION	)
J.R.E. ENTERPRISES	)
ENTERTAINMENT UNLIMITED,	)
JOHN RANDALL DUMAS,	)
SOUTHERN BELLES PARTNERSHIP,	)
BIMBO BARS, INC.	)
S.B. La BARE, INC.	)
S.B. YOUNGBLOODS, INC.,	)
TEMPO TAMERS, INC.,	)
CORPORATION LEX, INC.,	)
JOHN R. DUMAS, INC.,	)
M.J.R., INC., D. BURCH, INC.,	)
DE JA VU, INC.,	)
ALLEN & BURCH, INC.,	)
CALVIN BERRY, III.,	)
SAUJAY PATEL,	)
RUDOLF FERNANDEZ, and	)
DALLAS MOTEL ASSOCIATION	)
	)
vs.	)
	)
THE CITY OF DALLAS,	)
A. STARKE TAYLOR, and	)
BILLY PRINCE	)

ORDER OF JUDGMENT

Defendants' motion to dismiss is DENIED and their motion for summary judgment is GRANTED, but DENIED as to subsections 41A-5(a) (8), 41A-5(c), part of 41A-5(a) (10) ("under indictment"), and 41A-5(a) (10) (A) (iii), (vi) - (ix). Plaintiffs' motions are GRANTED only to those subsections. The City is enjoined from enforcing the subsections, and they are severed (id. at section 41A-23[5]). Thus limited, the Ordinance is constitutional.

Signed this 12th day of September, 1986.

JERRY BUCHMEYER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FW/PBS, INC., et al.	)	
	)	
vs.	)	CA3-86-1759-R
	)	
THE CITY OF DALLAS, et al.	)	

MEMORANDUM OPINION

The law of zoning allows the will of a majority, expressed through a representative body, to control the evolution of a community and shape its character.[1] The law of free speech, in contrast, prevents the majority will from suppressing minority expression that the majority finds intolerable.[2] It is perhaps inevitable that the two values should

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1 See Euclid v. Amber Realty, 272 U.S. 365 (1926) and Lombardo v. Dallas, 124 Tex. 1, 73 S.W. 2d 475 (1934) (first establishing that zoning is a proper exercise of the police power), overruling Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921) (zoning as unauthorized intrusion on property rights); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (zoning may promote "family values [and] youth values"); Berman v. Parker, 348 U.S. 26, 33 (1954) (zoning may promote values that "are spiritual as well as physical, aesthetic as well as monetary"); Stansberry v. Holmes, 613 F.2d 1285, 1288 (5th Cir.), cert. denied, 449 U.S. 886 (1980) ("zoning provides one of the firmest and most basic of the rights of local control").

2 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas"); Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (state is "denied the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believes is false and fraught with evil consequence"); United States v.

clash, when a zoning ordinance attempts to limit the freedoms of those involved in expressing unpopular views.[3] A body of first amendment/zoning jurisprudence has thus emerged, in an attempt to reconcile this potential for conflict.[4] Because the zoning law under attack in this case -- the recently enacted "sexually oriented business" ordinance of the City of Dallas -- follows the dictates of this recent hybrid body of law, it is

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Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (constitution embodies principle of "free thought -- not free thought for those who agree with us but freedom for the thought we hate"); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (Ku Klux Klan); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the "right to receive information and ideas, regardless of their social worth, is fundamental"); Cohen v. California, 403 U.S. 15, 25 (1971) ("in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated"); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1982); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

3 See Goldman v. Weinberger, 54 U.S.L.W. 4298, 4304 (U.S. 1986) (Brennan, J., dissenting) ("in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority").

4 See Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976); New York v. Uplinger, 467 U.S. 246 (1984); City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986); New York v. P.J. Video, 54 U.S.L.W. 4396 (U.S. April 22, 1986); Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (U.S. July 7, 1986); Basiardanes v. City of Galveston, 682 F. 2d 1203 (5th Cir. 1982); Stansberry v. Holmes, 613 F.2d 1985 (5th Cir.), cert. denied, 449 U.S. 886 (1980); Hart Bookstores v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); Northend Cinema, Inc. v. Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978), cert. denied sub nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). See also United States v. O'Brien, 391 U.S. 367 (1968); Schad v. Mount Ephraim, 452 U.S. 61 (1981); Erznoznick [sic] v. City of Jacksonville, 422 U.S. 205 (1975).

constitutional, except for the four minor exceptions discussed below.[5]

I. The Ordinance

On June 12, 1986, the Dallas city attorney presented a proposed ordinance regulating sexually oriented businesses to the Dallas City Plan Commission. The Commission considered studies carried out in other cities, but did not undertake a study of Dallas. See Defendants' Exhibit (DX) 6 (Austin), DX 7 (Indianapolis), and DX 11 (Lo Angeles). The Commission did consider, however, a map of Dallas indicating areas in which sexually oriented businesses could locate under the proposed ordinance. See Transcript (DX 1) at 5, 30-33. The Commission also heard public testimony, both for and against the proposed ordinance. See id. at 11-51. The Commission voted unanimously to recommend adoption of an ordinance regulating sexually oriented businesses[6]

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5 This opinion resolves the case on cross-motions for summary judgment, because there are no genuine issues of material fact. See Celotex Corp. v. Catrett, 54 U.S.L.W. 4775 (U.S. June 25, 1986). The Dallas sexually oriented business ordinance is attached as Appendix A.

6 The rubric of "sexually oriented business" was apparently adopted not because it yielded a snappy, if somewhat unfortunate, acronym ("S.O.B"), but because a witness before the Commission testified that the alternative term, "adult entertainment," is one "that the pornographers invented to sort of dilute the anguish that people would have if they knew what was actually going on in these places." Transcript (DX 1) at 15 (testimony of Elvin Arnold, Dallas Ass'n for Decency); see also DX 17 at 4 (reflecting cause for name change was Arnold's testimony).

The Ordinance went before the Dallas City Council on June 18, 1986. The Council considered the three studies that were before the Commission, see Transcript (DX 17) at 3. The Council also considered a Dallas study comparing crime rates in two commercial sections, one with sexually oriented businesses and one without. See id. at 3 (finding crime rates 90 percent higher in adult district). After hearing public comment -- unanimously in favor of the ordinance -- the Council adopted it by unanimous vote. See id. at 28. Both representative bodies were in unanimous accord on the benefits of the ordinance.

Legislative intent. Divining the intent of a legislative body is inherently problematic,[7] but the intent of both the Commission and the Council in adopting the Ordinance is transparently clear. Five of the 15 members of the Commission[8] and four of the 11 members of the Council[9]

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7 Determining legislative intent here does not involve the thorny problems courts have associated with drawing intent from incomplete journals of congressional debates. See Chrysler Corp. v. Brown, 441 U.S. 281, 31 (1979); Aldridge v. Williams, 3 How. (44 U.S.) 9, 24 (1845); Blitz v. Donovan, 740 F.2d 1241, 1247 (D.C. Cir. 1984); Northern Colo. Water Conservancy Dist. v. Federal Energy Regulatory Comm'n, 730 F.2d 1509, 1518 (D.C. Cir. 1984) (Wright, J.); see also Marc N. Garber & Kurt A. Wimmer, President's Statements at Signings No Help to U.S. Judges, 8 (52) Nat'l L.J. 15, 42 (Sept. 8, 1986). The record here reflects the entire remarks of each legislator and witness, and the Court may divine intent from the proceedings as an integrated whole.

8 See Commission Transcript (DX 1) at 23 (Albright: "it isn't the product itself that we're attempting to address here, but rather it's the problems that are caused by a certain type of business"); id. at 48 (Averitt:

stated unequivocally -- to no dissent -- that the Ordinance was concerned solely with controlling the secondary effects of sexually oriented businesses on surrounding neighborhoods.[10]

"we're not deciding today whether people should or should not read, watch, do any of these activities"); id. at 49-50 (Albright: "the content has absolutely nothing to do with it"); id. at 51-52 (Wynne: "compelling government objective [is] controlling the crime associated with the concentration of commercial establishments of this type"); id. at 57-58 (Garrigan: "adverse effect that the business of selling pornography has on the surrounding community") id. at 58-59 (Letot: "property values, neighborhood blight, crime").

9 See Council Transcript (DX 17) at 6 (Holcomb: "these types of establishments causing crime"); id. at 23-25 (Ragsdale: adult motels "contine to . . . increase the crime"); id. at 25-26 (Richards: this is part of our anti-crime package"); id. at 26 (Palmer: "clearly, I think that the intent of this ordinance is to reduce crime. It is clearly to reduce urban blight and to reduce the possibility of the deterioration of economic values, both in businesses as well as in residences").

10 This was also the clear intent of the drafter of the ordinance. See Affidavit of Analeslie Muncy (DX 3). Moreover, each of the three studies considered by both the Commission and the Council came to the conclusion that sexually oriented businesses were associated with rising neighborhood crime rates and dropping neighborhood property values. See DX 6 (Austin: appraisers found "negitive impact" on property values and police found crime rate at "nearly double" the whole-city rate); DX 7 (Indianapolis: sex-related crime rate is 77 percent higher in adult area, and property appreciated at only one-third to one-half the city rate); DX 11 (Los Angeles, noting increase in crime but not entirely conclusive on property values in all areas). Other studies, both those explicitly relied on by the drafters and those not used, come to similar conclusions. See DX 8 (Houston); DX 9 (Beaumont); DX 10 (Amarillo); DX 12 (Phoenix); DX 13 (Las Vegas); DX 14 (Seattle).

Most importantly, the study performed of a section of Dallas -- albeit a small and perhaps not entirely representative section -- determined that crime in an area dominated by sexually oriented businesses was 90 percent higher than in the city as a whole. See Study (DX 20); see also Affidavit of Rick Stone (DX 19) (methodology). A similar but more anecdotal study, carried out by the Sheraton-Mockingbird hotel, demonstrated substantial crime in its vicinity arguably generated by the presence of sexually oriented businesses. See Sheraton Study (DX 22); see also Affidavit of J.W. Vandeveer (DX 21).

Both groups stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. It is of no moment that the public speakers in favor of the Ordinance supported it almost singularly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses,[11] as neither the Council nor the Commission relied on the specious view that pornography "causes" various social ills and should thus be

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11 There is little doubt that the most vocal supporters of the ordinance -- from such groups as the Dallas Association for Decency, the American Renewal Foundation, and the Citizens for Decency Through Law -- applauded the ordinance for its incidental impact on speech. Although such witnesses may have had the intent to "zone [sexually oriented businesses] out of existence" by a law that was the "strongest vehicle toward elimination" of such businesses, see DX 6 at 3 (remarks of Atlanta city attorney that formed basis for finding of improper motive, see Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 [N.D. Ga. 1981]), the City evinced no such illegal motive. Cf. Weinstein, Regulating Pornography: Recent Legal Trends, Land Use Law, February 1982, at 4. No inquisition into the "true" intentions of the legislators is warranted here, cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 270 (1977), as the operative effect of the law and the statements of the legislators indicate that the purpose of the law was permissible. See Palmer v. Thompson, 403 U.S. 217, 224 (1971), Washington v. Davis, 426 U.S. 229, 243 (1976) ("operative effect of the law rather than its purpose is the paramount factor").

eliminated.[12] The intent of the City in passing the Ordinance

12 Cf. U. S. Department of Justice, Attorney General's Commission on Pornography, Final Report 305 (Washington, D.C.: Government Printing Office, July 1986) (relied upon by defendants). In this connection, the Dallas City Council and Plan Commission could instruct the Meese Commission on the difference between correlation and causation. The critical inquiry here is whether secondary effects are associated with speech, see Renton v. Playtime Theatres, 106 S. Ct. 925 (1986). The Meese Commission -- which performed no original research -- ignored decades of scientific evidence to conclude that pornography "causes" crime. But see, e.g., Malamuth & Donnerstein, The Effects of Aggressive-Pornographic Mass Media Stimuli, 15 Advanced and Experimental Social Psychology 103 (1982); Malamuth & Feshbach, Testing the Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the Normality of Rapists, 14 Journal of Research in Personality 121 (1980); Malamuth, Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli, 10 Archives of Sexual Behavior 33 (1981); Commission on Obscenity and Pornography, Report (1970) ("erotic material is [not] a significant cause of sex crime").

There is a concurrent judicial recognition that the tenuous link between pornography and crime is not sufficiently established to form the basis of any sound public policy. See, e.g., Stanley v. Georgia, 394 U.S. 557, 567 (1969) ("given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits"). Indeed, the premier case on pornographic literature pointed out that even the most innocuous -- and, indeed, moral -- material may lead to violent sex crime:

> Heinreich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. Demille's The Ten Commandments. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life came clear: women were the source of the world's trouble and it was his mission to both punish them for this and to execute them. Leaving the theater, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies in acid baths, first had his murder-inciting dreams and vampire longings from watching the 'voluptuous' procedure of -- an Anglican High Church Service!

was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself.

The Council's findings. The Ordinance enacted by the City incorporated several findings. The City first found that it has authority to regulate businesses pursuant to its police power, and that licensing is a reasonable means to ensure that subject businesses comply with regulations. See Ordinance (DX 16) at 2. The Council then found that a substantial number of sexually oriented businesses require regulation to protect the "health, safety, and welfare" of the establishments' patrons and citizens in general. Public safety authorities should regulate such businesses, the Council reasoned, because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." Id. The Council next found that arrests for sex-related crimes near sexually oriented businesses have been "substantial," and that there is "convincing documented evidence" that sexually oriented businesses are associated with falling property values of surrounding business and residential areas. Then, the

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Memoirs v. Massachusetts, 383 U.S. 413, 432 n. 11 (1966) (Douglas, J, concurring), quoting Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 668 (1964).

Based on this false and largely discredited causal nexus, the Meese Commission recommends the constitutionally suspect course of eliminating the speech rather than eliminating its secondary effects -- the better course, followed here.

Council found that when such businesses are located in close proximity to one another, "urban blight" and a decrease of the quality of life in adjacent areas results. Finally, the Council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. Id. at 5. The Council emphasized, however, that it did not intend to limit access by adults to sexually oriented material protected by the first amendment. Id.[13]

The Ordinance's terms. Based on these findings, the Council enacted an ordinance that pervasively regulates the operation of all sexually oriented businesses in Dallas. The most important changes made by the Ordinance, which is [sic] discussed in detail with the relevant arguments, are (1) strict locational prohibitions, including the requirement that a business be at least 1,000 feet from another sexually oriented business, or a church, school, residential area, or park;[14] (2) required licensing and inspection for all regulated businesses; (3) disqualification from licensure of any applicant who has been convicted of a specified crime, or whose spouse has been so convicted; (4) requirements that all patrons in an arcade --

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13 The Ordinance makes it a defense that "each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value." Ordinance at 41A-21(e); see also Roth v. United States, 354 U.S. 476, 489 (1957).

14 The "location" restriction also provides that there may not be more than one sexually oriented business "in the same building, structure, or portion thereof." See Ordinance, section 41A-13(c).

even if within a closed booth -- be within the sight of a manager; and (5) various layout, furnishing, hiring, and lighting restrictions on regulated businesses.

II. The Plaintiffs

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the Ordinance: (1) adult arcades; (2) adult bookstores or adult videostores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the Ordinance.[15]

Under section 41A-13(f) of the Ordinance, each business is deemed a "nonconforming use" because of its location within 1000 feet of another sexually oriented business, or a church, school, residential district, or park. The plaintiffs may continue their business for a period of three years from June 18, 1986, unless "sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more."

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15 Even if representatives of each of the two absent sexually oriented businesses were present, it would not affect the constitutionality of the Ordinance. There is some question, however, about the vagueness and breadth of the primary business purpose of a sexual encounter center: "activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude." Ordinance, 41A-2(16)(B). Although defendants broadly assert that "such businesses are "not entitled to first amendment protections anyway," Response at 3 n.l, citing Stansberry v. Holmes, 613 F.2d 1285 (5th Cir.), cert. denied, 447 U.S. 929 (1980), the businesses are certainly entitled to fair notice that their conduct is prohibited by statute, see Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971). As the issue is not squarely presented to the Court, it need not be resolved.

Plaintiffs are also prohibited from "increasing, extending, or altering" their businesses unless they are changed to a conforming use. At the conclusion of the three-year period under 41A-13(f), only the "first-established and continually operating" sexually oriented business at a particular location may continue to operate -- so that the dispersal of sexually oriented businesses in Dallas will be completed by June 18, 1989.[16]

The Ordinance would force many plaintiffs to relocate. Many are near specified-use areas; others are within 1000 feet of one another -- as are plaintiffs Deja Vu, Texas Rose, Baby Dolls Saloon, Million Dollar Saloon II, Expose, and Bachman Cafe. The relocation provisions threaten the businesses with enormous expenditures; many have great investments in their locations and the value of their property -- such as S.B. Sugars, Inc., which has obtained financing on a parking lot valued at $1,000,000. Other plaintiffs face economic hardship from the Ordinance's restrictions on their activities. Adult motels, for example, will be restricted to renting rooms for at

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16 A sexually oriented business that has been denied licensure because of location restrictions may apply for an exemption under section 41A-14. The application is decided by a permit and license appeal board, with reference to enumerated findings required by the Ordinance. An exemption may only allow operation of a sexually oriented business for 12 months, at which time the business may apply for another exemption. The standards set forth in this section are drawn almost verbatim from Young, 427 U.S. at 54 n.7. If the City improperly denies a request for exemption -- e.g., by failing to apply the Young standards in section 41A-14 -- the applicant has recourse in a state court suit, by showing that the City's denial is not supported by "substantial evidence," see post at 21 n.26.

least ten hours, rather than the two-hour period common now -- thus cutting their income by up to 80 percent.

The main attack in this case is, therefore, the location restriction and the three-year amortization period of section 41A-13(f). Plaintiffs also level attacks against each provision of the Ordinance that applies to them, claiming that the Ordinance's provisions are vague and overbroad, that its licensure requirement is unconstitutional, that it vests overbroad discretion in the Chief of Police, and that the Ordinance is not sufficiently related to the City's objectives.

III. Standing

As a threshold issue, the City makes the argument -- apparently one considered obligatory in cases such as this -- that various defendants [sic] have no standing to challenge the Ordinance. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983); Brown v. Edwards, 721 F. 2d 1442, 1446-47 (5th Cir. 1984). Moreover, the City claims that the plaintiffs' challenges are not ripe, because there is no "real and immediate threat" of closure of their businesses. Plaintiffs do not, however, present "abstract" questions of possible injuries. There is no doubt that the Ordinance, once effective, would pervasively change the manner in which each plaintiff runs his or her business; many would close. "It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been

sought." Fernandes v. Limmer, 663 F2d 619, 625 (5th Cir. 1981); see also Star Satellite, Inc. v. City of Biloxi, 779 F. 2d 1074, 1078 (5th Cir. 1986); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969). The City's position amounts to a claim that plaintiffs' attacks could be asserted as a defense to an eventual state prosecution for defiance of the Ordinance. Such a forum would not, however, protect plaintiffs' rights. See Dombrowski v. Pfister, 380 U.S. 479 (1965) (defense in state suit "will not assure adequate vindication of constitutional rights. . . a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition"); Steffel v. Thompson, 415 U.S. 452 (1974); Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975). No state prosecution is underway, and the complete determination of plaintiffs' claims here will aid and expedite the City's efforts, rather than delaying and hindering them.[17] Cf. Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975); Trainor v. Hernandez, 431 U.S. 434, 446 & n.8 (1977). Under the factual allegations presented, plaintiffs do

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17 A delayed and piecemeal determination of plaintiffs' constitutional claims would not serve the City. As counsel agreed in chambers when this Court set an accelerated schedule for resolving this controversy on cross-motions for summary judgment, a wholesale determination of the Ordinance's validity would permit orderly enforcement of the law and an expedited appeal, and save both the plaintiffs and the City substantial funds allotted in anticipation of protracted litigation. See DX 17 at 27-29.

have standing to challenge the Ordinance and their challenge is ripe for determination.

IV. Constitutionality

Regardless of the Ordinance's focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms have an incidental impact on expression that is protected by the first amendment.[18] Because of this impact, it is appropriate to analyze the statute under the four-part test of United States v. O'Brien, 391 U.S. 367, 377 (1968). See City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986); Young v. American Mini Theatres, 427

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18 See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981); Jenkins v. Georgia, 418 U.S. 153 (1974); Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952). The City does not allege that the conduct in which plaintiffs engage involves obscenity, which is prohibited by separate statute and which may permissibly be prohibited because it is not protected by the first amendment. See Miller v. California, 413 U.S. 15 (1973) ("obscene material is unprotected by the first amendment"); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); see also New York v. Ferber, 458 U.S. 747, 757 (1982) (child pornography is outside the protections of the first amendment). Nor does the City advocate the novel -- and largely unsupportable -- position that pornography is, like obscenity, outside the bounds of the first amendment. Cf. Schauer, Speech and "Speech" -- Obscenity and "Obscenity:" An Exercise in the Interpretation of Constitutional Language, 67 Ga. L.J. 899 (1979); Finnis, Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222 (1967); Attorney General's Commission on Pornography, ante at 6 n. 12, at 260-262 (section entitled "Is the Supreme Court Right," claiming that "the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the first amendment issues is incorrect"), citing Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum L. Rev. 391 (1963). See also Memoirs v. Massachusetts, 383 U.S. 413, 453 (1966) (Clark, J., dissenting) (justifying controlling "erotic and pornographic material;" by reference to obscenity's status as non-first-amendment material), citing Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U. Pitt L. Rev. 469 (1964), Hoover, The Fight Against Filth, The American Legion Magazine (May 1961).

U.S. 50, 79 (1976) (Powell, J., concurring). Under the O'Brien test, regulation is justified despite its impact on first amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on . . . first amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U. S. at 377. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. Renton, 54 U.S.L.W. at 4161.[19] The first three elements may be considered without reference to the specific requirements of the Ordinance; a determination of whether the Ordinance's particular terms follow the least restrictive means available must, however, be made independently for each of the Ordinance's restrictions.

First, it is without doubt that the police power of the City encompasses the power to enact a zoning and regulatory ordinance such as that considered here. See ante at 1 n.1; see also Renton, 54 U.S.L.W. at 4161 (similar ordinance within police power). Second, the interests the City studied and

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19 Time, place, and manner restrictions are permissible if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 648 (1981). But see Renton at 4164 (Brennan, J., dissenting) (zoning adult businesses necessarily content-based).

intended to further by the Ordinance -- crime control, protection of property values, and prevention of urban blight, see ante at 4-5 & nn. 8-9 -- are both important and substantial. See Young, 427 U.S. at 49 (Powell, J., concurring).[20] Third, the intent of the City -- garnered from complete reports of both the Plan Commission and City Council proceedings -- demonstrates that the governmental interest was unrelated to the suppression of free expression. See ante at 4-5 nn. 8-10. The legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community.[21] The first three elements of the O'Brien test are satisfied;

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20 Indeed, the three governmental interests sought to be advanced by the Ordinance are at the very heart of the rationale for allowing local governments the power to zone:

> It [is] undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult concept of quality of life."

Young, 427 U.S. at 80 (Powell, J. concurring), quoting Village of Belle Terre v. Boraas, 416 U.S. at 13; see also ante at 1 n.1.

21 The unanimity of permissible intent here far surpasses that upheld by the Supreme Court in passage of the Renton ordinance; the combination of legislative study and intent demonstrated here might even satisfy the standards of Justices Brennan and Marshall in dissent. Although the impetus for this result may be the particular type of content conveyed by such businesses, the government may permissibly tailor its reaction to different messages according to the degree to which its interests are implicated. See Young, 427 U.S. at 82 n.6 (Powell, J, concurring), citing Tinker v. Des Moines School Dist., 393 U.S. 503, 509-11 (1969); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); Greer v. Spock, 424 U.S. 828, 842-44 (1976) (Powell, J., concurring).

evaluation of the fourth factor requires reference to each challenged section of the Ordinance.

Locational restrictions. The element of the Ordinance that is most vigorously challenged is the one element that is least susceptible to challenge after Young and Renton. Section 41A-13 states that a sexually oriented business cannot be located within 1000 feet of (1) a church; (2) a public or private elementary or secondary school; (3) a boundary of a residential district; (4) a public park adjacent to a residential district; (5) the property line of a lot devoted to residential use; or (6) another sexually oriented business. If a regulated business is currently in violation of this section, it is deemed a nonconforming use and allowed to continue to operate for three years. A properly located regulated business is not rendered a nonconforming use by the subsequent location of a church, school, park, or residential area within 1000 feet of the business.

No doubt remains after Renton and Young that dispersed zoning of sexually oriented businesses is permissible, provided that "reasonable alternative avenues of communication" exist. See Renton, 54 U.S.L.W. at 4162; see also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-6 (1981); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). In Young, a Detroit zoning plan similar to that challenged here was approved, but "[the] situation would have been quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."

Id. at 71 n.35; accord, Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982) (only "oppressive options remained to an aspiring promoter of adult films"); Olmos Realty Co. v. State, 693 S.W.2d 711, 714 (Tex.Civ.App. -- San Antonio, no writ); Keego Harbor Co. v. Keego Harbor, 657 F.2d 94 (6th Cir. 1981) (ordinance prohibited all theaters); Alexander v. City of Minneapolis, 698 F.2d 936, 937-38 (8th Cir. 1983) (ordinance led to closing all theaters); Purple Onion, Inc., v. Jacksonville, 511 F. Supp. 1207, 1217 (N.D. Ga. 1981) (sites either "unavailable, unusable, or so inaccessible to the public [that] they amount to no locations"); Renton, 54 U.S.L.W. at 4167 (Brennan, J., dissenting) (must have "reasonable opportunity to operate"). The majority opinion in Renton, however, has made it clear that there need be only a "reasonable" opportunity to locate within the city; the Court expressly rejected findings of fact that the 520 acres left open by the ordinance was not truly "available" for regulated use.[22]

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22 In Renton, the Court held that it was clearly erroneous for the circuit court to find the ordinance invalid because "practically none" of the available land was currently for sale or lease, and because there were no "commercially viable" locations left open by the ordinance. See City of Renton v. Playtime Theatres, Inc., 748 F.2d 527, 534 (9th Cir. 1985); Renton, 54 U.S.L.W. at 4163. Rather than reviewing in detail the choices available to regulated businesses under the ordinance, the Court stated that "the first amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theatre within the city." Renton, 54 U.S.L.W. at 4163. The first amendment, the Court said, does not require that "speech-related businesses . . . obtain sites at bargain prices," id., but only that a city "make some areas available" for such businesses, id. at 4164.

The land available for sexually oriented businesses under the Dallas ordinance is substantial, and satisfies Basiardanes and Renton. The maps considered by the City upon enacting the Ordinance detail several areas that are open to sexually oriented businesses, and it cannot be said that a "reasonable" opportunity for such businesses does not exist under the Ordinance. The plan adopted by Dallas differs markedly from the Galveston plan rejected in Basiardanes, 682 F.2d at 1214; that plan incorporated an outright ban on 85-90 percent of the city's total area, and the remaining areas, located "among warehouses, shipyards, undeveloped areas, and swamps," were reached by "few access roads." Id. The Dallas plan, in contrast, permits location in several areas stretching from the inner city area to the north and south suburbs, accessed by such major thoroughfares as Interstate 35, Interstate 30, Loop 12, Highway 183, and Harry Hines Boulevard. Eight to ten percent of the city's total area -- 21,000 acres -- is available. Cf. Renton, 54 U.S.L.W. at 4163 (5 percent). See DX 15; PX 1; DX 27. There is no impediment to the locational restrictions enacted in the Ordinance.[23]

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23 Plaintiff's exhibits 3, 4, and 5, and the Street Affidavit (Sept 10, 1986), command no contrary result. These affidavits seek to establish that the areas left open by the Ordinance are undesirable as a matter of business judgment by those involved in sexually oriented businesses, but it is clear that Renton disavowed reliance on precisely such information. See Renton, 54 U.S.L.W. at 4163-64.

The three-year amortization clause is also challenged. Such clauses, however, are uniformly upheld. See Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 100 S. Ct. 3028 (1980) (upholding six-month amortization period); Northend Cinema, Inc. v. Seattle, 90 Wash. 2d 709, 585 P.2d 1153, 1160 (1978), cert. denied sub nom. Apple Theater v. Seattle, 441 U.S. 946 (1979) (upholding three-month amortization period); see also Note, Using Constitutional Zoning to Neutralize Adult Entertainment -- Detroit to New York, 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period); SDJ, Inc. v. City of Houston, 636 F. Supp. 1359, 1371 (S.D. Tex. 1986) (six-month period). See generally Lubbock Poster Co. v. City of Lubbock, 569 S.W. 2d 935, 940-43 (Tex.Civ.App. -- Amarillo, writ ref'd n.r.e.).[24] The period allowed by the Ordinance is more generous than others that have been upheld;

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24 Plaintiffs' exhibits 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, Affidavits of Bill Staten, Tracey Robertson, Beverly K. Van Dusen, Paul Radnitz, Bruce Wayne Logan, Gayla Marilynn Wolf, J. R. Estes, William C. Evert, Jr., Charles E. Carlock, and Plaintiffs' Statement of Impact all seek to establish that the period is invalid because of plaintiffs' pre-existing debts. Although the Ordinance will harm plaintiffs' profitability, the period is reasonable under accepted principles. See City of University Park v. Benners, 485 S.W.2d 773, 777-78 (Tex. 1972); Zahn v. City of Los Angeles, 274 U.S. 325 (1927) (economic detriment to regulated industries permissible); Ascarate v. Villalobos, 148 Tex. 254, 223 S.W. 2d 945, 950 (1949) (same). This is not a case where structures must be demolished to accomplish the state's reasonable exercise of police power, cf. Lubbock Poster Co., 569 S.W.2d at 940; if it is not profitable for plaintiffs to relocate, the Ordinance does not prohibit them from using their established structures for other enterprises.

it is a valid mechanism used to enforce valid locational regulations.[25]

Licensure requirement. Although there is no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses[26] and pay reasonable fees,[27] plaintiffs challenge the manner in which the licensing

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25 Equally valid is the section's provision for an exemption from location restrictions. Even if there were a constitutional entitlement to waiver provisions in an amortization period -- which is doubtful, see Northend Cinema, 585 P.2d at 1159 -- the exemption utilized in this section is that upheld by the Supreme Court in Young, 427 U.S. at 56 (noting that court below rejected vagueness challenge to waiver provisions). Plaintiffs' argument that this section, like the licensure section, vests unbridled discretion in the Police Chief will be dealt with below, see post at 20-21.

Moreover, the section of the Ordinance prohibiting more than one sexually oriented business from locating in the same building -- section 41A-13(c) -- is constitutional. See Hart Bookstores v. Edmisten, 612 F.2d 821 (4th Cir. 1979). As the City admitted at oral argument, it interprets the Ordinance to permit one business to deal in several different media; if the City reneges on this interpretation, it would be a simple matter for an applicant to claim in state court, see Memet v. State, 642 S.W.2d 518, 524 (Tex.Civ.App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.), that the City is now estopped from changing the interpretation on which this Court based a finding of constitutionality. See Hicks v. Harris, 606 F.2d 65 (5th Cir. 1979) (government may be estopped by official with authority).

26 Licensing, as plaintiffs concede, is a valid method of ensuring that regulated businesses abide by locational and other restrictions. See Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980); see also Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); SDJ, Inc. v. City of Houston, 636 F. Supp. at 1368 (S.D. Tex. 1986); Schope v. State, 647 S.W.2d 675 (Tex.Civ.App. -- Houston [14th Dist.] 1982). Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981), hold nothing to the contrary; that court found a specific intent to suppress speech. See id. at 504.

27 See Genusa, 619 F.2d at 1213 (100); Bayside Enterprises v. Carson, 470 F. Supp. 1140, 1148-49 (M.D. Fla. 1979) ($400); Borrago v.

scheme is implemented and the qualifications the scheme imposes upon licensees. The challenge is sustained only as to subsections 41A-5(a) (8), 41A-5(a) (10) (B) (c), part of 41A-5 (a) (10), and 41A-5(10) (A) (iii) and (vi)-(ix); the City will be enjoined from enforcing those sections, which may be easily severed from the remainder of the Ordinance.[28]

It is settled constitutional principle that any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority. See Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969); Saia v. New York, 334 U.S. 558 (1948). The City argues that the Ordinance vests no discretion in the Chief of Police, as it states that he "shall" approve the issuance of a license "unless" a factual basis for denial exists. This assertion is largely correct, but it is a simplistic view of the actual operation of two subsections of the Ordinance. First,

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City of Louisville, 456 F. Supp. 30 (W.D. Ky. 1978) ($250); Airport Book Store v. Jackson, 248 S.E.2d 623 (Ga. 1978) ($500.). The license fee challenged here is valid; it is not excessive in view of the substantial administrative costs to be defrayed in the implementation of the Ordinance, see Cox v. New Hampshire, 312 U.S. 569 (1941), and is rationally related to the permissible purposes of the Ordinance. It is not, then, a tax levied on an expressive enterprise in violation of the first amendment. Cf. Fernandes v. Limmer, 663 F.2d 619, 632-33 (5th Cir. 1982), cert. dismissed, 458 U.S. 1124 (1982); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) ("it is beyond dispute that the states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems").

28 The constitutional infirmities identified could also be changed by amendment without significantly altering the Ordinance's purpose in light of the City's objectives.

section 41A-5 (a) (8) allows the police chief to deny a license to an applicant who has been employed in a sexually oriented business on a finding that "he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner" (emphasis added).[29] Second, the Ordinance allows an applicant with a past conviction to be granted a license if the sufficient amount of time has elapsed, but section 41A-5 (c) allows the police chief to grant a license to such an applicant "only if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business" (emphasis added). Neither section provides sufficiently definite standards to pass constitutional muster.

Both sections ask the police chief to make subjective judgments on the fitness of an applicant; neither, then, is controlled by standards "susceptible of objective measurement." Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967). The Ordinance is silent to what conduct may reasonably be considered operation of a business in a "peaceful manner."[30]

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29 This infirmity here is not repeated in the similar language of section 41A-9 (5). That section allows a license to be suspended if a licensee has demonstrated an inability to operate a business "in a peaceful and law-abiding manner thus necessitating action by law enforcement officers." This section is thus limited by its language to certain objective indications of an inability to operate a business peacefully.

30 Indeed, some may find the concept of "peaceful" operation of a sexually oriented business to constitute an oxymoron, in light of recent

The Ordinance is more specific in addressing the "present fitness" of an applicant with a past conviction; in at least one case, however, the specificity itself constitutes overbroad discretion -- one factor the police chief is to take into account is "the amount of time that has elapsed since his last criminal activity." See subsection 41A-5 (c) (3). Under this subsection, then, the police chief is permitted to extend indefinitely the periods specifically enumerated by the Ordinance in subsections 41A-5 (a) (10) (B) (i-iii). By reference to the "extent and nature" of the applicant's past criminal activity, id. at 51A-5(c) (1), the applicant's age at the time of the offense, id. at 41A-5 (c) (2), the applicant's "conduct and work activity," id. at 41A-5 (c) (4), evidence of the applicant's "rehabilitation," id. at 41A-5 (c) (5), and letters "from prosecution, law enforcement, and correctional officers," id. at 41A-5 (c) (6), then, the police chief may determine that an applicant will not be granted a license. These two subsections vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny.[31]

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challenges claiming that pornography is invariably violent to women. See American Booksellers Ass'n. Inc. v. Hudnut, 54 U.S.L.W. 2143 (7th Cir. 1985) (rejecting Minneapolis ordinance as "thought control"); Callahan, Women and Pornography, American Film, March 1982, at 63. Although this view has been invalidated, there is little in the Ordinance to keep similar subjective views from being grounds for license denial (would operating business catering to sadists or masochists, for example, be "peaceful"?).

31 The infirmity could easily be cured by amendment. Section 41A5 (a) (8) could be limited to arrest or police action, as is section 41A-9 (5);

Shorn of the two sections that vest subjective and unguided authority in the police chief, however, the largest part of the licensure section is constitutional. The findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible. See Memet v. State, 642 S.W. 2d 518, 524 (Tex. Civ.App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.); Schope v. State, 647 S.W.2d 675, 680 (Tex.Civ.App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.). Age restrictions are factually based, see subsection 41A-5 (a) (1), as are determinations of past due fees and taxes, see id. at 41A-5 (a) (3),[32] see Schope, 647 S.W.2d at 680 (upholding ordinance including such factors); Bayside Enterprises v. Carson, 470 F. Supp. 1140, 1148 (M.D. Fla. 1979) (upholding unpaid tax or fee provision); Genusa, 619 F.2d at 1219-20 (upholding provision for false statements). Failure to comply with the Ordinance, subsections 41A-5 (a) (4) and (9), may be objectively verified, as may approval of premises by

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section 41A-5 (c) could be limited to the same elapsed-time standard of section 41A-5 (B).

32 This subsection is not invalidated by Doe v. City of Buffalo, 56 N.Y..2d 926, 453 N.Y.S.2d 605, 439 N.E.2d 321 (1982). The language before the New York Court of Appeals provided that "such other information" as the licensing authority might require must be provided. Here, however, the further information that may permissibly be required of an applicant is limited to that "reasonably necessary for issuance of the license." It is thus limited to information the police chief may need to determine whether an applicant is in compliance with other provisions of the Ordinance, and does not confer "open-ended discretionary power." Doe, 56 N.Y.2d at _ 453 N.Y.S.2d at 606, 439 N.E.2d at _.

health, fire, and building officials, subsection 41A-5 (a) (6). See SDJ, Inc. v. City of Houston, 636 F. Supp. at 1368-69 (S.D. Tex. 1986). Whether an applicant resides with someone who has been recently denied a license or whose license has been revoked,[33] subsection 41A-5 (1) (5), may be objectively verified. Finally, although this court agrees that "persons with prior criminal records are not first amendment outcasts," Fernandes v. Limmer, 663 F.2d 619, 630 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982), denial of licensure to

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33 This provision is apparently meant to prevent rejected applicants from skirting the intent of the law by simply recruiting housemates, see Fischer v. Dallas Federal Savings & Loan Ass'n, CA3-79-565-R, slip op. at 7 n.5 (N.D. Tex. June 18, 1985) ("there's nothing that I wouldn't do / if you would be my POSSLQ"), to become "licensees" on behalf of the disappointed applicant. It is thus permissible; although a freedom-of-association challenge could be mounted to the subsection, its success would be most doubtful after Lyng v. Castillo, 54 U.S.L.W. 4864 (U.S. June 27, 1986) (Stevens, J.) (statutory classification based on living arrangement upheld). Indeed, the language of which plaintiffs complain was taken from two other ordinances that have been applied to plaintiffs for years: the theater ordinance, section 46-4 (a) (7), and the dance-hall ordinance, section 14-3.

those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted.[34]

Five enumerated crimes, however, are not sufficiently related to the purpose of the Ordinance to withstand scrutiny. Although thirteen of the offenses are clearly related to the purpose of the Ordinance as it was debated by the City, no findings exist to justify prohibiting one convicted of (1) a controlled substances act violation, (2) bribery, (3) robbery, (4) kidnapping, or (5) organized criminal activity from obtaining a license to operate a sexually oriented business. In the absence of such findings, this Court cannot say that the offenses enumerated are sufficiently related to the purpose of the Ordinance -- either for constitutional purposes, or for purposes of the City's authority under Texas law. See Young,

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34 This principle was squarely addressed in Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (U.S. July 7, 1986) (Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. See id. at 5062. If violation of law by a licensee may permissible justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. Accord, 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E. 2d 623 (Ga. 1978), cert. denied sub nom. Gateway Books v. Jackson, 441 U.S. 952 (1979). One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant -- such as prostitution, obscenity, or child pornography, see Ordinance at 41A-5 (a) (10) (a). It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed, see id. at 41A-5 (a) (10) (B). It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome.

427 U.S.50;, 56 n.11;[35] see also Tex. Civ. Stat. Ann. art. 6252-13c (supp. 1986) (denial of license proper only if crime "directly relates to an occupation"). Subsections 41A-5 (a) (10) (A) (iii), (vi), (vii), (viii) and (ix) are thus constitutionally and statutorily invalid.

The language of subsection 41A-5 (a) (10) that compels the police chief to deny licensure to an applicant "under indictment or misdemeanor information" for a specified crime must also fail. Although the city undoubtedly has a legitimate interest in preventing one convicted of a specified crime from holding a license, see ante at 26 and n.34, denial on the basis of mere indictment or information cannot pass constitutional scrutiny.[36] An indictment or information is not evidence of an applicant's guilt, but merely indicates that an ex parte procedure navigated solely by a prosecutor has resulted in a finding of probable cause. See United States v. Calandra, 414 U.S. 338,

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35 The operation of these subsections against the plaintiffs present in this case demonstrates that the effect they would have upon applicants is quite real. Gayla Marilynn Wolf, an owner of a video concern, has been convicted of robbery, see Wolf Affidavit at 3; and William C. Evert, Jr., an owner of a bookstore, has been convicted of a controlled substances act violation, see Evert Statement at 5.

36 Denial of licensure on the basis of investigation into a crime constitutes punishment without the requisite finding of guilt. "Our system of justice reserves punishment to those who have been convicted -- beyond a reasonable doubt -- of an offense; collateral punishment without process has no place in our constitutional scheme." Parks v. Rogers, CA3-85-1411-R, slip op. at 3 (N.D. Tex. 1986); see also Branzburg v. Hayes, 408 U.W. 665, 686-87 (1972) (grand jury serves "as a protector of citizens against arbitrary and oppressive governmental action").

344-45 (1974). The simple act of indictment or information cannot carry the heavy burden implicit in suppressing speech that is protected by the first amendment,[37] and may implicate overbreath in chilling protected speech.[38] Dispositively, however, the prohibition against licensure of one under indictment or information fails the fourth O'Brien test in that less restrictive means of accomplishing the legislative goal exist. If the City intends to forestall revocation procedures against one who is eventually convicted of a specified crime by denying a license to an applicant under indictment, it may easily accomplish this purpose by amending to defer decision for a limited period of time[39] on an application to see if an

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37 This aspect of the Ordinance is not a content-neutral time, place, and manner restriction on protected speech; denial of a license amounts to an absolute suppression of expression. "In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the first amendment without bearing the burden of showing that its restriction is justified." Philadelphia Newspapers v. Hepps, 106 S.Ct. 1558, 1564 (1986). Cf. Smith v. California, 361 U.S. 147 (1959) (procedural rules ordinarily valid may be barred because of the threat to first amendment rights). Surely this burden cannot be carried by a bare statement of probable cause.

38 See Broadrick v. Oklahoma, 413 U.S. 601 (1973). A legitimate theater that occasionally exhibits explicit, non-obscene films but is not a "sexually oriented business," such as various repertory theaters in Dallas, would be forced to curtail such exhibitions in fear that a film that is subject to mere indictment as obscenity would jeopardize a pending license application -- regardless of an ultimate non-obscenity finding.

39 The threat this subsection poses to applicants is palpable. Two plaintiffs here would be foreclosed by its terms -- Beverly D. Van Dusen, owner of two bookstores, has been charged with obscenity violations, and the matter is set for trial, see Van Dusen Affidavit at 2; Bruce Wayne Logan, owner of Eros Dallas, has been awaiting trail for two years on a promotion of prostitution charge, see Logan Affidavit at 2.

adjudication of guilt has been made during this period -- requiring denial and subsequent reapplication is both inefficient, see Posner, Economic Analysis of the Law, passim (1972) (duplicative expending of administrative and legal resources), and constitutionally infirm.[40]

Plaintiffs also attack various procedural aspects of the licensure system, including the appeal process, under Freedman v. Maryland, 380 U.S. 51 (1965). Primary to their contention is their claim that "no judicial review is provided for." This assertion, however, is entirely meritless. Although no provision for judicial review is made, none is needed. One denied a permit may seek a hearing, appeal that hearing, and then turn to courts of law." Memet, 642 S.W.2d at 524; see also Dixon v. Love, 431 U.S. 105 (1977); Harper v. Lindsay, 616 F.2d 849, 858 (5th Cir. 1980). The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process.

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40 Section 41A-5 (b), which states that appeal of a conviction shall have no effect on a disqualification, is not subject to a parallel infirmity; such provisions are routinely upheld, as they deny an applicant against whom a finding of guilt has been made. See State Bar Act, section 16 (e), 1A Tex. Rev. Civ. Stat. art. 320a-1 (when attorney is convicted of felony involving moral turpitude or of misdemeanor involving theft embezzlement, or fraudulent appropriation, the district court "shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction"); see also Bailey v. State, 575 S.W.2d 418 (Tex.Civ.App.--Ft. Worth 1978, writ ref'd n.r.e.); c.f. McInnis v. State, 618 S.W.2d 389 (Tex.Civ. App.--Beaumont 1981, writ ref'd n.r.e.), cert. denied, 456 U.S. 976 (1982).

Definitions. Vagueness challenges are imposed against the various definitions and terms utilized in the Ordinance. All terms used, however, are designed to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute," Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971), in light of common understanding and practices.[41] Grayned v. City of Rockford, 408 U.S. 104, 110 (1971). Indeed, the language of many provisions has been taken from ordinances upheld by the Supreme Court, see Young, 427 U.S. at 53 ("specified sexual activities" and "specified anatomical areas"); City of Renton, 54 U.S.L.W. at 4161 ("primary purpose"). Other elements of the Ordinance have been upheld by the courts. See Hart Bookstores v. Edmisten, 612 F.2d 821, 833 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980) ("distinguished or characterized by"); Miller v. California, 413 U.S. 15, 24 (1973) ("depicting or describing"); Hart Bookstores, 612 F.2d at 834 ("adult bookstore"); Stansberry v. Holmes, 613 F.2d 1285, 1290 (5th Cir. 1980) ("major business," similar to "principal business purpose" used in Ordinance);[42] Basiardanes v. City of

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41 This holding does not embrace the definition given to sexual encounter centers, as no such business is present. See ante at 10; n.15.

42 Requiring a vendor of books dealing in "specified sexual activities" to have the sale of such material as "one of its principal business purposes" is the sole bar to finding that, for instance, the Government Printing Office Bookstore is a "sexually oriented business" due to its pandering of the Meese Commission report, ante at 6-7 n.12 -- a work that is explicit in its description of activities 41A-2 (19) (A), (B), (C), and (D). See, e.g., the

Galveston, 682 F.2d 1203, 1210 (5th Cir. 1982) ("regularly" features); Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied sub nom. Apple Theater v. Seattle, 441 U.S. 946 (1979) ("adult theater"); 15192 Thirteen Mile Road, Inc. v. City of Warren, 626 F. Supp. 803, 808 (E.D. Mich. 1985) ("escort agency"); SDJ, Inc. v. City of Houston, 636 F. Supp. at 1364 (topless bars).[43] There is no constitutional impediment to the phraseology of the Ordinance.

Internal restrictions. The Ordinance requires various internal restrictions of regulated businesses -- from major renovations in the design of adult arcades to the allowance of sofas in nude modeling studios. While such intrusions into the internal design of regulated businesses may seem unduly

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155 pages of graphic descriptions of pornographic paperback books, peep shows, tabloids, films, and videos -- including complete and very explicit summaries of Deep Throat, The Devil in Miss Jones, and Debbie Does Dallas -- bravely written, after his prolonged study of and exposure to this relentless and unmitigated sleaze, by the redoubtable Senior Investigator Haggerty. Id. at 1647-1802. Although the Meese Commission concluded that sustained "viewing [of such] nonviolent, sexually explicit material . . . is statistically related to a higher probability of" sexual crimes, id. at 172, we are merely left to wonder about the fate of Senior Investigator Haggerty and his tragic battle against these statistical probabilities.

43 Plaintiffs make the general objection that the Ordinance cannot be directed to adult cabarets at all, claiming that a "paucity" of evidence concerning such establishments was considered by the City. This is incorrect, as both major studies considered -- those from Austin and Indianapolis -- concerned topless bars. Moreover, any consideration of the Ordinance and the discussion surrounding it, as a whole, reveals that the City did indeed consider topless bars part of the condition the Ordinance seeks to ameliorate; the City may permissibly include adult cabarets in the Ordinance.

restrictive, they have consistently been upheld.[44] See Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986) (requiring closed viewing booths to be within view of management "falls within the broad general limits of the police power" and satisfies O'Brien); Ellwest Stereo Theatres v. Wenner, 681 F.2d 1243, 1246 (9th Cir. 1982) (same); EWAP, Inc. v. City of Los Angeles, 92 Cal.App.3d 179, 158 Cal.Rptr. 579 (1979) (same); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1227 (N.D. Ga. 1981) (nude modeling studios may be pervasively regulated, as they contain no element of "expression"); Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985) (display to minors); Pollard v. Cockrell, 578 F.2d 1002, 1013 (5th Cir. 1978) (permissible to distinguish between "legitimate" and regulated use of nude models). The City did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n.9 (statement of Ms. Ragsdale), cf. Patel & Patel v. South San Francisco, 606 F. Supp. 666, 671 (N.D. Cal. 1985) (no findings); moreover, recent pronouncements of

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44 A major internal restriction that plaintiffs saw as an egregious intrusion upon the working of their businesses -- the interpretation of the Ordinance that only one "type" of sexually oriented business may be located in one building -- is, in fact, nonexistent. The City admitted at oral argument that the Ordinance does not operate to restrict several media being dealt with by one sexually oriented business; thus, those plaintiffs that have, for example, an adult arcade plus a book and video store may continue to operate in that manner (albeit in a new location if they must relocate under the location restrictions).

state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulations on adult motels. See Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (no privacy right to consensual homosexual, and, arguably, heterosexual sodomy); Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied,

54 U.S.L.W. 3863 U.S. July 7, 1986).[45] As the City has made the requisite findings, the various restrictions on the

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45 Bowers determined that the state could prohibit certain sexual practices because "prohibitions against [such] conduct have ancient roots," Bowers, 54 U.S.L.W. at 4921, in "Judeo-Christian moral and ethical standards," id. at 4922 (Burger, C.J., concurring). Based on the arguments before it, this Court need not inquire into whether other "prohibitions" that have "ancient roots" also require granting broad powers to states wishing to return to such time-honored values – such as, for example, the value that women may be treated as chattels.

Such a view certainly has "ancient roots." Indeed, the venerable Blackstone noted that at Roman law, a creditor might sell a debtor's wife into slavery to redeem his debts – and that in East India, a creditor is entitled to "violate with impunity the chastity of the debtor's wife." 2 Blackstone's Commentaries 472-73 (1778). The "Judeo-Christian" roots of such a view are, likewise, well-established. See The Bible (Timothy 2:12) ("I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence"); The Koran, ch. 4 ("men have authority over women because Allah has made the one superior to the other . . . for those from whom you fear disobedience, admonish them and send them to beds apart and beat them"); J. Knox, The First Blast of the Trumpet Against the Monstrous Regiment of Women (1558) ("to promote a woman to bear rule . . . is repugnant to nature, contumely to God"). This view was shared by those respected in law; Aristotle found that "women may be said to be an inferior man," and Lord Chesterfield described women as "children of a larger growth."

The law was persistent in defining the domain in which woman could permissibly be present. Myra Bradwell discovered this fact at the hands of the Supreme Court, when it held that Illinois could permissibly prohibit her from practicing law. See Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"); see also Muller v. Oregon, 208 U.S. 412, 421 (1908) (a "Woman's physical structure [places] her at a disadvantage in the struggle for subsistence"). The law told her not only where she could not be, then, but where she should be. See Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938) ("there is but a twilight zone between a mother's love and the atmosphere of heaven, and . . . no child should be deprived of that maternal influence"); Jenkins v. Jenkins, 173 Wis. 595, 181 N.W. 826, 827 (1921) ("nothing can be an adequate substitute for motherly love"). The attitudes have been persistent. See Hill v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983) ("I don't think any female law clerk is going to give me a lot of input on how to decide a case"); see also Martin, Fathers and Families: Expanding the Familial Rights of Men, 36 Syracuse L. Rev. 1265, 1267 (1986). However, the "outer limits" of Hardwick – like those of the right of privacy itself, see Baker v. Wade, 553 F. Supp. 1121, 1135 (N.D. Tex. 1982) – have not yet been established, so it is too early to tell if centuries-long, western culture objections to rights now held (or sought) by females and others will receive the same analysis and treatment as the right of privacy claims by the homosexual plaintiff in Hardwick. See Hardwick, 54 U.S.L.W. at 4926 nn.4, 5 (Blackmun, J., dissenting) (heterosexual sexual conduct, racial prejudice).

operation, layout, design and furnishing of regulated businesses must be upheld. See Young, 427 U.S. at 56 nn.11-12.

Summary. Only the four subsections described above -- 41A5(a) (8), 41A-5 (c), the "under indictment or information" language of 41A-5 (a) (10), and the five unrelated crimes of 41A-5 (a) (10) -- fail to satisfy the fourth prong of the O'Brien test. The ordinance is thus constitutional, with the above minor exceptions -- which are severable, see section 41A-23 (5), and may be cured by amendment.

IV. Conclusion

Efforts to restrict the accessibility of sexually oriented speech have long been part of Western legal tradition,[46] as has the principle that expression should be free and unfettered.[47] The reconciliation of the competing values implicit in these two long-standing concepts inevitably shifts over time, in response to technological change[48] and evolving conceptions of the legality of legislating majoritarian conceptions of morality.[49]

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46 The first reported obscenity case at common law, Le Roy v. Sir Charles Sidney, 1 Sir. 168, pl. 29 (K.B. 1663), involved Sir Charles, a nude and profane nobleman on a London balcony who spewed an "offensive liquor" upon a crowd -- "the proximate source of the "offensive liquor" appears to have been Sir Charles." Memoirs, 383 U.S. at 428 n.4. Another early case resulted in a finding that the tract "Venus in the Cloister or the Nun in Her Smock" placed the general morality in jeopardy. See Dominus Rex v. Curl, 2 Strange 288, 93 Eng. Rep. 849 (K.B. 1727). Early transplants of the doctrine to this country involved those intending to "deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall." R.V. Hicklin, L.R., 3 Q.B. 360; (1868); see also Ex Parte Jackson, 96 U.S. 727 (1878).

47 See, e.g., Milton, Areopagitica: A speech for the Liberty of Unlicensed Printing 24 (1644); Locke, A Letter Concerning Toleration (1689); Bentham, Fragment on Government (1776); Mill, On Liberty (1859).

48 See Community Television of Utah, Inc. v. Roy, 555 F. Supp. 1164 (1982); Trauth & Huffman, Obscenity and Cable Television: A Regulatory Approach (1986).

49 See, unfortunately, Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 54 U.S.L.W. 3863 (U.S. July 7, 1986) (morality justifies prohibiting consensual sodomy); Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (same). Accord, Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (morality justifies limiting expression); Devlin (1979) (moral concensus requisite to societal survival).

Restrictions in the place and manner of sexually oriented expression through zoning regulation is the most recent jurisprudential attempt to allow majority community structure to coexist with minority expression; the sexually oriented business ordinance enacted by the City follows the substantive dictates of this body of law, and must be upheld.

Signed this 12th day of September, 1986.

JERRY BUCHMEYER
United States District Judge

APPENDIX A

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1.	Purpose and intent.
SEC. 41A-2.	Definitions.
SEC 41A-3.	Classification.
SEC. 41A-4.	License required.
SEC. 41A-5.	Issuance of license.
SEC. 41A-6	Fees.
SEC. 41A-7.	Inspection.
SEC. 41A-8.	Expiration of license.
SEC. 41A-9.	Suspension.
SEC. 41A-10.	Revocation.
SEC. 41A-11.	Appeal.
SEC. 41A-12.	Transfer of license.
SEC. 41A-13.	Location of sexually oriented business.
SEC. 41A-14.	Exemption from location restrictions.
SEC. 41A-15.	Additional regulations for escort agencies.
SEC. 41A-16.	Additional regulations for nude model studios.
SEC. 41A-17.	Additional regulations for adult theaters and adult motion picture theaters.

SEC. 41A-18. Additional regulations for adult motels.
SEC. 41A-19. Regulations pertaining to exhibition of sexually explicit films or videos.
SEC. 41A-20. Display of sexually explicit material to minors.
SEC. 41A-21. Enforcement.
SEC. 41A-22. Injunction.
SEC. 41A-23. Amendment of this chapter.

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1. PURPOSE AND INTENT

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas. (Ord. 19196)

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with"specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified

sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) NUDITY or a STATE OF NUDITY means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

16) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(17) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(19) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(20) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(21) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. 19196)

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(1) adult arcades;

(2) adult bookstores or adult video stores;

(3) adult cabarets;

(4) adult motels;

(5) adult motion picture theaters;

(6) adult theaters;

(7) escort agencies;

(8) nude model studios; and

(9) sexual encounter centers. (Ord. 19196)

SEC. 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches.

Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable. (Ord. 19196)

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, 41A-20.

(10) An applicant or an applicant's spouse has been convicted of or is under indictment or misdemeanor information for a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor.

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code.

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

(iii) engaging in organized criminal activity as described in Chapter 71 of the Texas Penal Code;

(iv) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(v) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;

(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;

(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;

(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor; or

(x) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a sexually oriented business license only if the chief of police determines that the